

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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Communications Assistance
For Law Enforcement Act

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CC Docket No. 97-213

OPPOSITION OF BELL ATLANTIC MOBILE, INC.

Bell Atlantic Mobile, Inc. (BAM), pursuant to Section 1.429(f) of the Commission's Rules, opposes the FBI's Petition for Reconsideration of the Commission's *Report and Order*¹ implementing Section 105 of CALEA.² The FBI's petition reargues issues that the Commission has already addressed and resolved. The Commission fully and correctly implemented Section 105. The FBI now asks, again, that the Commission go well beyond the requirements of Section 105, and impose additional burdens on carriers that are clearly unwarranted. The FBI's petition should be denied in all respects for three separate reasons.

¹ *Report and Order*, CC Docket No. 97-213, FCC 99-11 (rel. Mar. 15, 1999), *Order on Reconsideration*, FCC 99-184 (rel. Aug. 2, 1999), 64 Fed. Reg. 51,462, 52,224 (Sept. 23, 1999).

² Notice of the FBI's petition for reconsideration was published in the *Federal Register* on January 21, 2000, specifying a deadline of today for filing oppositions. 65 Fed. Reg. 3451.

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1. The petition is defective because it reargues issues that the Commission already decided. It is settled law that the Commission will not grant a petition for reconsideration when it merely reargues matters that were previously addressed.³ The claims that the FBI now advances on reconsideration resurrect its earlier efforts during the notice and comment period of this proceeding to have broad reporting and personnel security obligations imposed on carriers, requirements that would far exceed what Section 105 mandates. The rulemaking record fully demonstrated why none of these obligations should be imposed, and the Commission properly declined to do so. The FBI's reconsideration petition advances no new arguments, let alone any arguments that would provide grounds for the Commission to reverse course.

2. The FBI fails to show why the Commission omitted any rules that are necessary to implement Section 105. CALEA amended the Communications Act to authorize the Commission only to "prescribe such rules *as are necessary*" to

³ See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, FCC 99-250 (rel. Sept. 27, 1999), at ¶ 8 (denying reconsideration because "petitioners largely reiterate arguments that were made in response to the *Second NPRM* and were considered and rejected"); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Order on Reconsideration*, CC Docket No. 96-115, FCC 99-223 (rel. Sept. 3, 1999), at ¶ 21 (denying reconsideration petitions because "we addressed and rejected this argument in the CPNI Order," and the petitioner "presented no new evidence.").

implement CALEA.⁴ This limitation is important. Before the Commission can adopt any rule, it must find that the rule is in fact necessary, based on facts in the record. The Commission followed this directive in adopting carrier security rules that it concluded were necessary to achieve the goals of Section 105, to ensure that interceptions “can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.”⁵ The Commission declined to impose the FBI’s wish list of additional requirements, correctly finding that they were not needed to fulfill Section 105.

The FBI now reiterates its demand for some of these requirements, but again fails to show why they are needed. Instead, the petition is based entirely on pure speculation about what might possibly happen in the future that might somehow compromise security in some unspecified way. The Commission, however, pointed to the evidentiary record that showed carriers had already taken comprehensive actions and implemented employee policies to ensure the security of interceptions – even without CALEA and any FCC rules. Nothing in the legislative history of CALEA indicated that Congress was concerned with existing practices. Carriers

⁴ 47 U.S.C. § 229(a) (emphasis added).

⁵ *Report and Order* at ¶ 17: “Based on the record before us, we find that, pursuant to our statutory authority, it is necessary for us to implement a very limited set of rules to assist telecommunications carriers in complying with their obligations under section 105 of CALEA and sections 229(b) and (c) of the Communications Act.”

submitted detailed evidence that their practices ensured the security of interceptions.⁶ In the face of that evidence, the FBI's reliance on speculative concerns is unavailing and does not come close to meeting CALEA's express requirement that any rules be found to be necessary to achieve Section 105's objectives. In short, there is nothing in the FBI's petition which shows why the Commission's decision did not strike the right balance intended by CALEA.

3. The Specific New Rules Proposed by the FBI Are Unwarranted.

Personnel Security. The FBI renews its argument for rules that would require carriers to submit employees to "background checks" by law enforcement, provide lists of "designated" employees authorized to conduct intercepts, and require these employees to execute non-disclosure agreements. Petition at 2-7. But the Commission has already considered and denied each of these requests, finding that they were "invasive," administratively impractical," and "could even compromise a carrier's ability to maintain a secure system." *Report and Order* at ¶¶ 25-26. Nothing in the FBI's petition supplies a basis for changing course.

⁶ AT&T Wireless, for example, stated that it had conducted over 1,300 interceptions in three metropolitan areas over a one-year period without a single security breach. AT&T Wireless Comments, filed Dec. 12, 1997, at 2. U S West reported that in over 25 years of its own security operations, there has never been an unlawful interception, nor has the confidentiality of a lawful interception been compromised. U S West Comments at 14.

The plain fact is that the FBI's demands would constitute an unprecedented intrusion by the government into carriers' security practices. Nothing in Section 105 or in the rulemaking record would support such an intrusion. The FBI supplies no evidence of problems or failures of carriers' existing personnel security practices that would justify these additional procedures. BAM, for example, has had in place for many years internal procedures that ensure that only those employees who are fully trained in the obligations imposed by federal and state wiretap laws participate in surveillance efforts, and only trained employees have access to interception records. No law enforcement agency has ever raised concerns about BAM's security or personnel practices.

The FBI's proposals would create innumerable issues and problems as well. For example, requiring mandatory background checks would raise serious issues as to conflicts with federal and state employment and labor laws that limit the use of such background checks, and would raise equally serious privacy concerns. There is no reason to reconsider these proposals, particularly given the complete absence of any factual record that could justify such intrusive requirements.

The FBI misleadingly claims that "Numerous commenters either stated that they supported an employee designation requirement, or indicated that such a requirement would necessitate no substantial departure from their existing practices." Petition at 4. In truth, those carriers merely explained the procedures they already follow, as a reason *not* to impose mandatory personnel security rules.

They did *not* endorse the mandatory regulations the FBI seeks – to the contrary, they opposed such rules.⁷

Surveillance Status Message. During the Commission's consideration of CALEA capability standards, the FBI demanded that those standards impose a surveillance status message capability. The Commission properly rejected the FBI's demand (although it acceded to many of the FBI's other requests for additional capability standards).⁸ Unwilling to take no for an answer, the FBI now resurrects the surveillance status message request in the guise of Section 105. The Commission should quickly dispose of this request. Nothing in Section 105 provides any basis to impose such a requirement. Moreover, the record showed that such a requirement would be enormously difficult to implement, particularly for wireless carriers.⁹ In any event, the FBI never sought to impose surveillance status as a Section 105 requirement in the first place, even though the Commission had asked for comments for the express purpose of implementing that provision. The Commission does not permit parties to sit on issues during the notice and comment

⁷ The FBI relies on BellSouth's comments, but those comments in fact state that a "designated employee" rule "is unnecessary." BellSouth Comments, filed Oct. 25, 1999, at 11. The FBI then cites U S West's comments, which also clearly state that "the Commission should *not* promulgate a formal rule on the need for a company to designate certain employees to interact with law enforcement." U S West Comments at 24 (emphasis added).

⁸ *Third Report and Order*, CC Docket No. 97-213, FCC 99-230 (rel. Aug. 31, 1999), at ¶ 110.

⁹ *Id.* at ¶ 99.

process and then raise them for the first time on reconsideration – in this case, a full year after the comment period closed.¹⁰ The FBI's request is untimely and thus defective.

Reporting of Security Breaches. The FBI's request for a more detailed obligation to report situations where security has been compromised is similarly invalid. The Commission has already required carriers to make such reports to law enforcement, but, recognizing the wide variation in the types of situations, times and locations where this might happen, rejected the FBI's demand that reporting be made within a specific time. However, it required carriers to report the breach within a "reasonable" time. *Report and Order* at ¶ 38. The FBI's request that "reasonable" be defined in detail would add nothing to achieving the security goals of Section 105 and should also be rejected.

Conclusion. The Commission struck the proper balance in imposing only those carrier security rules that it found, based on a comprehensive record, were essential to achieving the goal of Section 105. Nothing in the FBI's reconsideration

¹⁰ Section 1.429(b) of the Commission's rules generally bars petitioners from advancing new matters during reconsideration, absent a showing as to why they were unable to raise the matter earlier. The FBI makes no such showing. See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Third Memorandum Opinion and Order*, CC Docket No. 94-102, FCC 00-7 (rel. Jan. 13, 2000) (rejecting reconsideration petition that requested the Commission to adopt rules that petitioner had not advocated during notice and comment period).

petition warrants altering that balance to impose further obligations on carriers.

The petition should be denied.

Respectfully submitted,

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Dated: February 7, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of February, 2000, caused copies of the foregoing "Opposition to Petition for Reconsideration" to be sent by first-class mail, postage prepaid, to the following persons:

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